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No. 03-1270

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES MASON, BILLIE JUNE RICHIE and GLENN BAILEY, individually and on behalf of a class of all others similarly situated,

Petitioners,

v.

THE AMERICAN TOBACCO COMPANY, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORP., PHILIP MORRIS INCORPORATED, LORILLARD TOBACCO COMPANY, LORILLARD, INC., UNITED STATES TOBACCO COMPANY, LIGGET GROUP INC., LIGGET & MYERS, INC. AND BROOKE GROUP LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The legal and practical need for this Court's review (if not summary disposition) is underscored by:

- the clear text of the Clarifying Amendments that overrule the Second Circuit's interpretation of the Medicare as Secondary Payer ("MSP") statute;
- the directly conflicting decision of the Eleventh Circuit in *United States v. Baxter Int'l Inc.*, 345 F.3d 866 (11th Cir. 2003), *petition for cert. filed*, No. 03-1341 (March 22, 2004) – an irreconcilable conflict astonishingly denied by Respondents-Defendants here even while it is trumpeted by Petitioners-Defendants in *Baxter*,[1] a conflict of allies that illustrates the confusion that reigns in courts below;
- the governing regulations, to which *Chevron* deference is due, that directly contradict the Second Circuit's reading of the MSP statute; and
- the devastating impact of the Second Circuit's decision on a vital safeguard of the financial integrity of Medicare, amply demonstrated by the billions of dollars at stake in this case.

In the face of all this, Respondents argue that Congress' Clarifying Amendments do not affect the Second Circuit's decision at all, going so far as to claim that "alleged tortfeasors" are uniquely exempt from the MSP regime. In fact, *not one word* in the MSP statute or regulations supports this theory; to the contrary, both the statute and the regulations contradict it.

At bottom, Respondents undertake an extended effort to evade the MSP obligations that apply to insured business entities. They advance unsupported conclusions that reflect nothing more than the hostility of Respondents and

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[1] *See Baxter* Pet. at 15-16. "*Baxter* Pet." denotes the Petition for a Writ of *Certiorari*, *Baxter Int'l Inc. v. United States*, No. 03-1341 (March 22, 2004).

the courts below to the policy judgments of Congress in the MSP statute and its recent clarification. *See* Grassley Br.[2] at 13-16. As Sen. Grassley points out, "judicial second-thoughts about the wisdom of a congressional enactment or trade-offs with other judicial values have no place in our constitutional system." *Id.* at 14.

1. Congress' clarification is not limited to tort settlements. The central question of this case is whether uninsured corporations like Respondents are "self-insured plans" under the MSP statute, and so are "primary plans" that must pay a Medicare beneficiary's medical expenses before Medicare. *See* Pet.[3] at 2. Congress' Clarifying Amendments put it beyond all doubt that "[a]n entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part." App. 32a. Respondents correctly say the obvious: "This provision was meant to include uninsured companies within the meaning of 'self-insured plan,'" Opp.[4] at 9, but they finish that sentence with a qualification: "thereby reversing *Thompson* and allowing MSP suits in cases involving tort settlements." *Id.*

Yet this supposed limitation to "tort settlements" is nowhere to be found in the Clarifying Amendments themselves. Respondents cite only a House committee report as authority, *id.*, but never explain how a committee report

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[2] "Grassley Br." denotes the Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of Senator Charles E. Grassley in Support of Petitioners, *Mason v. The American Tobacco Co.*, No. 03-1270 (April 9, 2004).

[3] "Pet." Denotes the Petition for Writ of *Certiorari, Mason v. The American Tobacco Co.*, No. 03-1270 (March 8, 2004).

[4] "Opp." denotes the Brief in Opposition on Behalf of Respondents Philip Morris USA Inc., Lorillard Tobacco Co., R.J. Reynolds Tobacco Co., and Brown and Williamson Tobacco Corp., *Mason v. The American Tobacco Co.*, No. 03-1270 (April 12, 2004).

could possibly operate to qualify the unambiguous, explicit text of a statute.

Moreover, this committee report does not remotely support the limitation Respondents claim. In the relevant passage, containing the only reference to *Thompson v. Goetzmann,* 337 F.3d 489 (5th Cir. 2003), the House committee wrote:

> Recent court decisions such as Thompson v. Goetzmann resulted in a narrow interpretation of the statutory reference to "promptly." Liability insurers would have been able to draw out their settlements and avoid repaying Medicare for payment of medical expenses. Moreover, firms that self-insure for product liability would have been able to avoid paying Medicare for past medical payments related to the claim.

H.R. REP. NO. 108-178 (II) (2003), *available at* 2003 WL 21690538 ("House Rep.").

Clearly, "recent court decisions," of which *Thompson* is only one example, spurred this committee's action. *See also* Grassley Br. at 6[5] ("Congress acted out of concern that the lower federal courts were misreading the MSP statute."). Furthermore, the committee cited *Thompson* as an example of an issue unrelated to the MSP status of uninsured businesses, the interpretation of "the statutory reference to 'promptly.'" *Id.* This report mentions "settlements" only in this context, and the correction of this problem is to be found in a completely different provision, in a completely different subsection of the Clarifying

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[5] Respondents seek to depreciate Sen. Grassley's explanation of the Clarifying Amendments during Senate debate (Grassley Br. at 11) as simply those of "an individual legislator." Opp. at 21 n.10. Of course Sen. Grassley was the Senate author and sponsor of the Clarifying Amendments, and as such, this Court has taught that his "remarks . . . are an authoritative guide" to their construction. *See North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 526-27 (1982).

Amendments (with even a different title to mark its different subject) from that containing the clarification for "self-insured plan." *See* App. 31a.

The last sentence of the quotation refers to self-insurance, but as a topic obviously distinct from *Thompson* and the interpretation of "promptly." When this report does address the clarification of "self-insured plans," it does so in terms unqualified by any limitation to tort settlements or by any reference to *Thompson*: "The list of primary plans for which conditional payment could be made would be expanded; an entity engaging in a business, trade, or profession would be deemed as having a self-insured plan if it carries its own risk. Failure to obtain insurance would be required as evidence of carrying risk." House Rep.

2.a. Nothing in the MSP statute or regulations exempts "alleged tortfeasors" from the MSP regime. Most of Respondents' argument that the Clarifying Amendments do not affect the Second Circuit's decision rests on their notion that the MSP statute does not apply to "alleged tortfeasors." Opp. at 19-22. Indeed, this is the central theme of all the reasons Respondents offer for denying the Petition. *Id.* at 14-15. In short, Respondents claim that Congress carved tort liability out from all other bases for the MSP duty to be the primary payer of a Medicare beneficiary's medical expenses, and established a two-step process that requires an entity's tort liability to an injured Medicare beneficiary to be established in lawsuit number one, and only then allows that tortfeasor's duty to reimburse Medicare to be established in lawsuit number two.

This notion is preposterous, as Sen. Grassley has conclusively demonstrated. Grassley Br. at 8-13. *See also* Pet. at 14-19. *Not one word* in the MSP statute or regulations supports this "alleged tortfeasor" exemption; to the contrary, both the statute and the regulations contradict it. Pet. at 14-16; Grassley Br. at 9-10. Even the House committee report on which Respondents rely confirms that

the MSP regime applies to "firms that self-insure for *product liability*." House Rep. (emphasis added).

The question here is whether Respondents constitute self-insured plans under the MSP statute. If they do, then the courts below were in error, and the case must be remanded for trial to determine whether the alleged injuries of Medicare beneficiaries were caused by Respondents' tortious conduct. *See* Pet. at 18; Grassley Br. at 11-12.

Respondents attempt to confuse the issue by claiming that Petitioners in effect seek to impose a money judgment on Respondents "*before* a determination of an obligation to pay." Opp. at 22 (emphasis in original). Not only have Petitioners never made such a bizarre argument, but Respondents do not explain how we could have. After all, whether an entity has a "liability insurance policy or plan (including a self-insured plan)," App. 40a, has nothing to do with whether that entity has engaged in conduct that requires Medicare to be reimbursed by such a plan. Put another way, whether or not an entity is a tortfeasor tells one nothing about whether that entity has insurance or is self-insured.

Moreover, Respondents' "alleged tortfeasor" exemption runs headlong into a body of well-established statutory causes of action. Like other actions created by Congress in which other wrongful conduct is a predicate element – such as civil RICO claims – tort liability is a predicate element of an MSP reimbursement action that plaintiffs must prove.[6] As a result, contrary to Respondents' claim, Opp. at 18, "the lower courts have long held that Medicare

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[6] *See, e.g.*, 18 U.S.C. § 1961(5) (RICO pattern of racketeering can be established through proof of two "chargeable" or "indictable" predicate acts, but defendants need not be convicted, or even charged, before RICO action brought); *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); 42 U.S.C. § 1983 (public employee may be sued for damages for malicious prosecution, which is defined by state law and need not be first established in a separate lawsuit).

is entitled to reimbursement under the MSP statute when the duty to pay is triggered by a tort." Grassley Br. at 10 (citing cases); Pet. at 15-16 (same).

b. An "alleged tortfeasor" exemption is at war with the MSP enforcement mechanism. Respondents' "alleged tortfeasor" exemption would render the MSP private cause of action, App. 42a, completely superfluous with respect to MSP liability founded on a tort, thereby violating the "cardinal principle of statutory construction that a statute ought . . . to be construed so that . . . no clause, sentence, or word shall be superfluous, void, or insignificant." *Alaska Dept. of Environmental Conservation v. EPA*, 124 S.Ct. 983, 1002 n.13 (2004) (internal quotations omitted). If a Medicare beneficiary successfully sued one of Respondents in a personal injury action, that beneficiary would recover the total costs of the medical care necessitated by the defendant's tort, including expenses paid for by Medicare.[7] As a result, if tort liability had to be established in a separate lawsuit, there never would be a circumstance in which a primary plan failed to make a primary payment (for it would have been compelled to do so in the initial tort suit), and so the private right of action enacted by Congress could never be brought when a Medicare beneficiary was the victim of a tort.

Indeed, Respondents' "alleged tortfeasor" exemption would do violence to the whole MSP enforcement mechanism designed by Congress. The purpose of that mechanism is to allow the government and private citizens "to sue in order to right an economic wrong done to the government." *Manning v. Utilities Mutual Ins. Co.*, 254 F.3d 387, 394 (2d Cir. 2001). If an individual tort action must be brought before an MSP action, then Medicare's

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[7] *See* RESTATEMENT (SECOND) OF TORTS § 920A(2) (2002) ("Payments made to . . . the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or part of the harm for which the tortfeasor is liable.").

interest in being made whole is hostage to the calculus of a private litigant, who may not have either the resources or the stomach to fight tortfeasors like the tobacco companies. Such a subordinate status to a myriad of private interests is hardly consistent with the public purpose of the MSP statute to "remedy losses to the United States Treasury." Grassley Br. at 4.

That public purpose is reflected in the goal of an MSP action: to recover what Medicare has paid. This is a sum certain, unencumbered by the individual issues that may militate against class certification of personal injury actions in the mass tort context. Thus, the district court initially concluded that if Petitioners were pursuing a valid cause of action, "a viable class action could be accommodated and certified." App 20a.[8] But that court went on to conclude that a class action was not necessary because Petitioners were suing as private attorneys general and could seek full reimbursement for Medicare without converting this case into a class action. App. 26a - 27a. If tort liability must be proved in a separate individual litigation, which for mass torts could require thousands of lawsuits, the advantage of an MSP action for securing a global reimbursement for Medicare would be lost, a result obviously at odds with the remedial purposes of the MSP statute.[9]

c. The "alleged tortfeasor" exemption reads liability insurance out of the MSP statute. Though

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[8] For this reason, comparing this case to other, non-MSP cases against Respondents where class treatment was denied, Opp. at 11 n.4, is not only irrelevant, but underscores that an MSP action seeks to remedy a governmental injury, wholly distinct from the personal injuries of the individual Medicare beneficiary.

[9] In this case, the amount Medicare has spent on various treatments is contained in available Medicare data, and Petitioners plan to establish what portion of those expenses were for smoking related injuries through epidemiological evidence.

Respondents say that "[u]nder certain conditions, tortfeasors are subject to the MSP," Opp. at 21, that could not be true under the Second Circuit's and Respondents' reading of the MSP statute. Like the Second Circuit, Respondents persist in reading liability insurance out of the MSP regime, characterizing the statute as if it only addresses health insurance. As Respondents put it, "MSP liability . . . turns on whether the primary plan was obligated to cover its insured's medical expenses." *Id.* at 3. A beneficiary of health insurance is the primary plan's insured, certainly. Yet the MSP statute also clearly covers "liability insurance," including "self-insured" liability plans, App. 40a, and the insured in the liability context is the tortfeasor. Moreover, the victim of the tortfeasor normally has no pre-existing relationship with the tortfeasor of any kind, much less as an "insured." *See* Pet. at 14-15; Grassley Br. at 8-9.

d. Reimbursement of Medicare's expenditures does not "federalize" tort law, which is a policy, not a legal, issue. Respondents also echo the courts below in their claim that a failure to exempt tortfeasors from the MSP regime would be to "federalize" tort law. Opp. at 1, 18. Even if this were true, this amounts to a policy disagreement with Congress, hardly a legitimate basis for the wholesale constriction of the MSP statute Respondents seek. *See* Grassley Br. at 13-16. "Federal courts may not disparage or act in derogation of the MSP statute on the basis of their reservations about the remedy it provides." *Id.* at 16.[10]

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[10] The policy differences of Respondents are also manifest in their characterization of this litigation as involving "garden-variety tort claims," Opp. at 1, while the Chair of the Senate Finance Committee notes that the "decision below has enormous adverse consequences for Medicare and the federal Treasury." Grassley Br. at 17. *See also* Pet. at 23-24.

More importantly, even if one blinds oneself to the huge, and growing, role of the Federal Government in medical care through Medicare, "surely it does not 'distort' federalism for Congress to provide that self-insured tortfeasors, like insured tortfeasors, are liable to the Treasury when their torts impose burdens on Medicare." *Id.* at 14. In doing so, the MSP statute neither creates nor modifies any substantive tort liability.

3. Respondents have effectively conceded the circuit conflict. Respondents concede that there is a conflict between the circuits, but strain to limit that conflict only to the Eleventh and Fifth Circuits on the question of whether a tort settlement is a "self-insured plan." Opp. at 17. Yet the ramifications of this fundamental concession cannot be cabined so narrowly. The heart of the dispute in those courts, as it was in the Second Circuit, was the meaning of "self-insured plan." The tort settlements there were just a particular application of this statutory concept, and the different interpretations of these courts has most definitely produced a square conflict over what this concept means, a conflict that includes the Second Circuit. Under the Eleventh Circuit's reading of the statute and regulations in *Baxter*, for example, there is no way to carve out "alleged tortfeasors" from the class of "self-insured plans" as the Second Circuit has done here. Certainly the *Baxter* Petitioners – whose interpretation of the MSP statute is aligned with that of Respondents here – believe, as we do, that the Eleventh Circuit's decision in *Baxter* "squarely conflicts with decisions of the Fifth and Second Circuits." *Baxter* Pet. at 15 (citing *Mason* and *Thompson*), 19 ("The Eleventh Circuit's decision also conflicts with an MSP decision of the Second Circuit.").

Respondents rely on the Second Circuit's effort to distinguish *Baxter* which claims that *Baxter* found the "establishment of a settlement fund" sufficient to create a self-insured plan, while here the "alleged tortfeasors . . . have yet to assume the medical costs of any identifiable

group of individuals." Opp. at 16. But the *Baxter* Court said precisely the *opposite*. 345 F.3d at 897, 898 n.25 (11th Cir. 2003) (settlement by a tortfeasor does not constitute a "self-insured plan"); Pet. at 21-22. Moreover, the quoted reference to an assumption of medical costs is nowhere found in the Eleventh Circuit's analysis, and is, in fact, simply a reiteration of the Second Circuit's erroneous revision of the MSP statute to apply only in the health insurance context.

Finally, Respondents conclude that the Eleventh Circuit's observation of "no tension" with the Second Circuit's decision in this case did not misapprehend Petitioners' case. Opp. at 17 n.5. Yet they neither offer support for that conclusion nor refute the fact of the Eleventh Circuit's obvious misunderstanding of our case as resting only on the theory that the corporate structure alone constitutes a self-insured plan. Pet. at 20 n.11. *Compare* Pet. at 8 (citing Complaint allegations that Respondents are self-insured plans as a matter of facts that "manifest a deliberate, *ex ante* plan to carry their own risk," and, alternatively, as a matter of law, due to their corporate structure). Indeed, the *Baxter* Court emphasized that it agreed with the Second Circuit only "to the extent that [it] hold[s] that the MSP requires the existence of some sort of plan as opposed to a mere *post hoc* assumption of liability." 345 F.3d at 896 n.22. *Baxter* expressly *disagreed* with the notion that "there cannot be a self-insured plan absent a setting aside of the funds and formal procedures." *Id.* at 898. Yet this proposition is the core holding of the Second Circuit here. Pet. at 9-10.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted, and the decision of the Second Circuit be summarily reversed, or set for plenary review.

Respectfully submitted,

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